

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Northern Telephone & Data Corp.	)	
for Waiver of Section 61.26(b)(1)	)	WC Docket No. 09-216
of the Commission's Rules	)	
	)	

**ORDER**

**Adopted: January 13, 2010**

**Released: January 13, 2010**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. In this Order, we deny a waiver petition filed by Northern Telephone & Data Corp. (NTD) because it fails to allege or show any of the criteria necessary to establish good cause for a waiver.<sup>1</sup> NTD's petition for a waiver of section 61.26(b)(1) of the Commission's rules, which limits the interstate access charges NTD may impose on interexchange carriers (IXCs), involves the competitive local exchange carrier (LEC) access rate benchmark adopted and affirmed in previous orders.<sup>2</sup>

**II. BACKGROUND**

2. NTD, a competitive LEC, filed a letter on November 20, 2009, seeking a waiver of section 61.26(b)(1) of the Commission's rules.<sup>3</sup> This rule generally provides that a competitive LEC may not tariff rates for interstate access services that are higher than the rates charged for such services by the competing incumbent LEC.<sup>4</sup> NTD asserts that a grant of its waiver request would allow it to file tariffed cost-based access rates.<sup>5</sup>

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<sup>1</sup> See 47 C.F.R. § 1.3; see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

<sup>2</sup> Petition of Northern Telephone & Data Corp. for Waiver of Section 61.26(b)(1) of the Commission's Rules (filed Nov. 20, 2009) (NTD Petition); 47 C.F.R. § 61.26(b)(1). See *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*CLEC Access Reform Order*); Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004) (*CLEC Access Reconsideration Order*); see also *Access Charge Reform, PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c) or in the Alternative, Section 61.26(a)(6) of the Commission's Rules*, CC Docket No. 96-262, Order, 23 FCC Rcd 2556 (2008) (*PrairieWave Order*).

<sup>3</sup> NTD Petition at 1; 47 C.F.R. § 61.26(b)(1).

<sup>4</sup> 47 C.F.R. § 61.26(b)(1).

<sup>5</sup> NTD Petition at 1.

3. The Commission adopted the rules in section 61.26(b), which NTD asks us to waive, as part of the access charge reform proceeding in 2001.<sup>6</sup> In the *CLEC Access Reform Order*, the Commission concluded that the access services market structure prevented competition from effectively disciplining prices.<sup>7</sup> The Commission found that certain competitive LECs used the tariff system to set access rates that were subject neither to negotiation nor to regulation, which could ensure the reasonableness of those rates. Those competitive LECs would then rely on their tariffs to demand payment from long distance carriers for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.<sup>8</sup> To address this market failure, the Commission revised its tariff rules to align tariffed competitive LEC access rates more closely with those of the incumbent LECs.<sup>9</sup>

4. Subsequently, in the *CLEC Access Reconsideration Order*, the Commission rejected several petitions for reconsideration of the rules adopted in the *CLEC Access Reform Order*.<sup>10</sup> With particular relevance to NTD's request here, the Commission rejected a waiver petition by TDS Metrocom (TDS) to permit competitive LECs to tariff higher access rates if they can demonstrate that their costs exceed those of the incumbent LECs with which they compete.<sup>11</sup> The Commission pointed out that TDS's request "assume[d] incorrectly that the Commission adopted a cost-based approach to competitive LEC access charges in its *CLEC Access Reform Order*."<sup>12</sup> The Commission stressed that it had "explicitly declined to apply this sort of regulation to competitive LECs."<sup>13</sup> More recently, the Commission has denied requests similar to NTD's. Specifically, the Commission rejected PrairieWave Telecommunications, Inc.'s (PrairieWave's) request for a waiver of section 61.26 of the Commission's rules.<sup>14</sup> And the Commission also denied a petition by OrbitCom requesting that the Commission forbear from tariff

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<sup>6</sup> See generally *CLEC Access Reform Order*, 16 FCC Rcd 9923. To ensure that competitive LEC access rates are just and reasonable, the Commission sought to respond to regulatory arbitrage opportunities that had arisen with respect to tariffed competitive LEC access services. See *id.* at 9924-25, paras. 2-3. The Commission limited its application of the tariff rules to competitive LEC interstate access services (defined only as interstate switched access services unless otherwise specified to the contrary). *Id.* at 9924, para. 2 & n.2.

<sup>7</sup> *Id.* at 9936, para. 32. The Commission explained that an IXC has no competitive alternative for access to a particular end user, and because the IXC pays access charges and recovers those costs through averaged rates, the end user has no incentive to avoid high-priced providers for access services. *Id.* at 9935, para. 31.

<sup>8</sup> *Id.* at 9925, para. 2.

<sup>9</sup> See 47 C.F.R. § 61.26. The Commission set a benchmark rate for tariffed competitive LEC access rates and concluded that competitive LEC access rates at or below the benchmark would be presumed just and reasonable. *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

<sup>10</sup> *CLEC Access Reconsideration Order*, 19 FCC Rcd at 9112, para. 9.

<sup>11</sup> *Id.* at 9136, para. 57; see *Access Charge Reform*, CC Docket No. 96-262, TDS Metrocom, Inc. Petition for Waiver (filed June 20, 2001).

<sup>12</sup> *CLEC Access Reconsideration Order*, 19 FCC Rcd at 9136, para. 57.

<sup>13</sup> *Id.*

<sup>14</sup> See generally *PrairieWave Order*, 23 FCC Rcd 2556 (finding that PrairieWave's request to base its access charges on costs was not in the public interest).

regulations set forth in sections 61.26(b) and (c).<sup>15</sup>

### III. DISCUSSION

5. The Commission may waive its rules when good cause is demonstrated.<sup>16</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>17</sup> In doing so, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>18</sup> Commission rules are presumed valid, however, and an applicant for waiver bears a heavy burden.<sup>19</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.<sup>20</sup>

6. As an initial matter, when an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances that warrant such action.<sup>21</sup> In its one-page petition, NTD offers only generalized assertions that section 61.26(b)(1) "require[s] NTD to sell interstate access services below cost." It provides no supporting data, cost studies, or other evidence of any kind. NTD thus fails to meet its fundamental burden to make the necessary showing for the relief it requests, and its petition for waiver is denied.<sup>22</sup>

7. Even if NTD had provided some minimal level of supporting information, it nonetheless fails to establish good cause for a waiver. Specifically, NTD does not allege or show any of the criteria necessary for a waiver of section 61.26(b)(1) of the Commission's rules.<sup>23</sup> First, NTD fails to demonstrate that special circumstances exist. Apart from its unsupported assertions that "NTD sell[s] fewer interstate access minutes, meaning that their rates by definition would need to be higher,"<sup>24</sup> NTD provides no evidence from which the Commission could determine that special circumstances exist. Moreover, in the *PrairieWave Order*, the Commission rejected these same arguments by a competitive LEC, found that they did not constitute special circumstances, and rejected its petition for waiver of

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<sup>15</sup> *Petition of OrbitCom, Inc. for Forbearance from CLEC Access Charge Rules*, WC Docket No. 08-162, Memorandum Opinion and Order, 23 FCC Rcd 13187 (2008) (finding that OrbitCom provided no evidence to support its request).

<sup>16</sup> 47 C.F.R. § 1.3; *see also WAIT Radio*, 418 F.2d at 1159.

<sup>17</sup> *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>18</sup> *See WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>19</sup> *See WAIT Radio*, 418 F.2d at 1157.

<sup>20</sup> *See id.* at 1159.

<sup>21</sup> *WAIT Radio*, 418 F.2d at 1157; *see also id.* at n.9 (stating "[t]he applicant for waiver must articulate a specific pleading, and adduce concrete support").

<sup>22</sup> *See Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968) (finding the Commission properly denied a waiver petition where the applicant failed to allege and substantiate its contentions and also noting the applicant's language lacked the specificity required for requesting a waiver).

<sup>23</sup> 47 C.F.R. § 61.26(b)(1); *see also* 47 C.F.R. § 1.3; *WAIT Radio*, 418 F.2d 1153.

<sup>24</sup> NTD Petition at 1.

section 61.26.<sup>25</sup> The Commission has emphasized that it specifically disclaimed reliance on cost to set competitive LEC access rates and instead applied a market-based approach when it adopted section 61.26.<sup>26</sup> Nothing in NTD's petition establishes any circumstances that warrant a deviation from or waiver of that generally applicable rule.<sup>27</sup>

8. Neither does NTD specifically allege or show that a grant of its requested waiver would serve the public interest. In its petition, NTD does not explain or address the Commission's expressed concerns about how a competitive LEC's access rates would remain just and reasonable if it were allowed to charge rates for access services higher than the benchmark.<sup>28</sup> Nor does it address how its requested relief, and the increased access charges that would result from its grant, would benefit consumers. Consistent with the Commission's prior decisions, we find that granting NTD's waiver request would not be in the public interest.<sup>29</sup> NTD provides no evidence to demonstrate that the criteria necessary to establish good cause for a waiver have been met,<sup>30</sup> therefore, NTD's waiver petition is denied.

#### IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that, pursuant to authority contained in sections 1, 3, 4(i), 201-205, 251, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154(i), 201-205, 251, 303(r), and sections 1.3 and 61.26 of the Commission's rules, 47 C.F.R. §§ 1.3, 61.26, and the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the petition for waiver by Northern Telephone & Data Corp. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett  
Chief, Wireline Competition Bureau

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<sup>25</sup> *PrairieWave Order*, 23 FCC Rcd at 2558-61, paras. 7-8, 13. The Commission rejected PrairieWave's arguments that the Commission should permit tariffed access rates according to cost studies because of size and economic differences between competitive LECs and incumbent LECs.

<sup>26</sup> *CLEC Access Reform Order*, 16 FCC Rcd at 9941, para. 45; *CLEC Access Reconsideration Order*, 19 FCC Rcd at 9136, para. 57). The Commission stated that, in setting the benchmark rate, "we seek, to the extent possible, to mimic the actions of a competitive marketplace." *CLEC Access Reform Order*, 16 FCC Rcd at 9941, para. 45. See also *PrairieWave Order*, 23 FCC Rcd at 2560-61, para. 13.

<sup>27</sup> NTD also asserts that it has a diminished ability to recover costs from retail customers but provides no evidence to support this assertion and fails to demonstrate how or why this would provide good cause for a waiver. See NTD Petition at 1; see also 47 C.F.R. § 1.3.

<sup>28</sup> See generally *CLEC Access Reform Order*, 16 FCC Rcd 9923. The Commission noted, for example, that implicit in terminating access is the fact that neither the party placing a long distance call, nor that party's IXC, can easily influence the called party's choice of service provider, thus potentially giving competitive LECs the incentive to charge excessive rates for terminating access service. *Id.* at 9927, para. 10.

<sup>29</sup> See *PrairieWave Order*, 23 FCC Rcd at 2561, para. 14 (citing *CLEC Access Reform Order*, 16 FCC Rcd at 9939, para. 41); see also *CLEC Access Reconsideration Order*, 19 FCC Rcd at 9136, para. 57.

<sup>30</sup> See 47 C.F.R. § 1.3; see also *WAIT Radio*, 418 F.2d 1153.